SUPREME COURT, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 405

ARMAND A. MAYER,
Petitioner,

v.

ARNOLD ORDMAN, AS GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAVID G. HEILBRUN,
Attorney for Petitioner,
500 Northland Towers West,
Southfield, Michigan 48075.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petitioner Armand A. Mayer hereby petitions this honorable court for a writ of certiorari to review an order

of the United States Court of Appeals for the Sixth Circuit rendered in this cause on March 29, 1968, and respectfully shows:

## (a) ORDERS IN THE COURTS BELOW

The District Court's order: Armand A. Mayer, Plaintiff, v. Arnold Ordman as General Counsel of the National Labor Relations Board, Defendant, unreported order granting Defendant's motion to dismiss (May 29, 1967). Copy of the order granting Defendant's motion to dismiss attached as Appendix A.

The Court of Appeals orders: Armand A. Mayer, Plaintiff-Appellant v. Arnold Ordman, as General Counsel of the National Labor Relations Board, Defendant-Appellee, order and opinion (March 29, 1968), — F.2d —. Copy of the opinion and order attached as Appendices B and C. Order overruling motion for reconsideration (April 30, 1968). Copy of the order overruling motion for reconsideration attached as Appendix D.

## (b) JURISDICTION OF THIS COURT

The order sought to be reviewed was dated and entered March 29, 1968. A motion for reconsideration with supporting affidavit and brief was made and was overruled by the order of the United States Court of Appeals for the Sixth Circuit dated and entered April 30, 1968. The statute conferring jurisdiction on this Court to review such order by writ of certiorari is 28 U.S.C. §1254.

## (c) QUESTIONS PRESENTED FOR REVIEW

1. Whether a person is foreclosed from the powers and processes of the National Labor Relations Board to prevent unfair labor practices by the pendency of arbitration proceedings which he unequivocally repudiates before their culmination in arbitral decision?

2. Whether an arbitration decision relating to the discharge of a person from employment in a given occupational classification with a given employer insulates that employer from future unfair labor practice charges arising out of its apparent discriminatory failure and refusal to employ, as a new employee and in a different occupational classification, the person previously discharged?

3. Whether there are any circumstances under which a Federal district court may review the action of the General Counsel of the National Labor Relations Board in refusing to normally and regularly investigate an unfair labor practice charge; but not as to the General Counsel's exercise of discretion in whether or not to issue complaint following such investigation.

## (d) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal constitutional provision involved is the Fifth Amendment (due process). The Federal Statutes involved are:

1. 29 U.S.C. §153(d)

> "There shall be a General Counsel of the Board. . . . He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title . . ."

2. 29 U.S.C. §158(a)(3)

"It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

3. 29 U.S.C. §160(a)

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce."

4. 29 U.S.C. §161

"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question."

## (c) CONCISE STATEMENT OF THE CASE

As of August, 1964, Armand A. Mayer had been employed as a truck driver for approximately seven years by Earl C. Smith, Inc. A collective bargaining agreement existed between Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and that employer. Under the terms of this collective bargaining agreement petitioner Mayer was a

union member. During the several months prior to August, 1964, Mayer filed several grievances seeking to rectify violations of this collective bargaining agreement by the employer.

On August 21, 1964, Mayer was discharged from his employment under circumstances making it appear that the discharge was discriminatory and in retaliation because of the filing of the several prior grievances. Preliminary hearings occurred before a bi-partite arbitration panel of the industry and subsequently, on January 26, 1965, a further hearing was scheduled and conducted at which, for the first time, Mayer presented his contention that he had been discriminatorily discharged because of his filing of grievances and not for the reason stated by the employer pertaining to damage to a vehicle he was operating.

On January 28, 1965, well before any disposition of the pending arbitration of Mayer's discharge by the bi-partite panel, Mayer filed a charge (Case No. 7-CA-5031) with the Seventh Regional Office, National Labor Relations Board alleging violations under Sections 8(a)1 and 8(a)3 of the National Labor Relations Act, as amended (28 USC 158). Mayer supported his charge with an affidavit dated February 2, 1965, stating in part:

> "I concluded that the Union was stalling until it was past the six months period for me to file with the NLRB. I, therefore, came here on January 28, 1965, and filed an unfair labor practice charge."

By letter dated February 10, 1965, the Regional Director notified Mayer that action would be deferred on his case pending the arbitration. Ultimately, on February 23, 1965, the bi-partite arbitration panel rendered its decision sustaining Mayer's discharge. His pending unfair labor practice charge was thereupon dismissed and this dismissal was sustained on appeal to the General Counsel.

By letter dated May 5, 1966, Mayer wrote to Earl E. Smith, Inc., requesting employment in any capacity. At the time of making such application and at all times thereafter this employer has been involved in a hiring program for general positions other than truck drivers. On May 12, 1966, Petitioner Mayer filed a charge (Case No. 7-CA-5562) under Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended, alleging that the employer had discriminatorily failed to employ him in any capacity. This unfair labor practice charge was dismissed by the Regional Office in which filed on the basis of the prior arbitration decision of February 23, 1965, and this dismissal was sustained on appeal to the General Counsel.

## (f-g) BASIS FOR FEDERAL JURISDICTION

Subparagraph (f) of Rule 23.1 is not applicable since the judgment sought to be reviewed is that of a federal court.

The basis for federal jurisdiction in the district court was that petitioner Mayer was being deprived of the right to due process secured by the United States Constitution and was seeking review of the General Counsel's refusal to normally and regularly investigate his unfair labor practice charge under provisions of the Administrative Procedure Act, 5 U.S.C. §1009, assuring freedom from arbitrary action of federal administrative agencies.

## (h) ARGUMENT

The Regional Director committed prejudicial error by deferring action on Case No. 7-CA-5031. Mayer had filed this case as was his entitlement as a person allegedly discriminated against and had supported it with his affidavit repudiating the pending arbitration proceedings. No basis existed to do other than consider the arbitration proceedings pre-empted and proceed to investigate the unfair labor practice charge and rule on its merits. *Carpenters Union Local 180,* 162 NLRB #92; *Hoerner-Waldorf Paper Products Co.,* 163 NLRB #105 and *Producer's Grain Corporation,* 169 NLRB #68. The action of the General Counsel in sustaining the dismissal of this case erroneously allowed the invidious influence of the arbitration decision to affect subsequent Case No. 7-CA-5562.

The existence of the prior arbitration decision has been used to nullify the duty of investigation owed by General Counsel. The arbitration decision did no more than resolve that so far as the bi-partite panel was empowered to act, Mayer's August 21, 1964, discharge would not be reversed. The decision had no other effect, even aside from the fact that deference should not have been given to its pendency by the Regional Director. The process of arbitration is not one which has the effect of governing future developments under new fact situations. *Michigan Shippers v. Loval 299, Teamsters,* unreported decision of the United States District Court, Eastern District of Michigan, Southern Division, 61 LRRM 2466, holds, in part, that an arbitration decision "merely determines that the facts produced upon hearing of the grievance did not establish a violation of the contract" and that rulings of that (arbitration) type are not "determinative of all future grievances under all contracts between the parties regard-

less of facts involved." The court characterized the argument that arbitration awards have future validity as having "no warrant . . . either in labor law or in the contract upon which this is based."

The District Court relied heavily on *Dunn v. Retail Clerks International Association,* 307 F.2d 285 in its decision. However, the *Dunn* case was an effort to seek direct court action against alleged unfair labor practices of a labor organization *without even the filing of an unfair labor practice charge.* It is improper to analogize *Dunn* to the present situation in which petitioner challenges not the general counsel's *discretion in whether to issue a complaint* but his *refusal to investigate.*

The principal reason that the arbitration should not have been honored is that it dealt with a question unrelated to the allegations of Case No. 7-CA-5562. In this case petitioner was cast as an applicant for any employment and as such was entitled to full protections of the National Labor Relations Act, as amended. *Phelps Dodge v. N.L.R.B.,* 313 U.S. 177; *Childs Co.,* 93 NLRB 281; *Pennwoven, Inc.,* 94 NLRB 175, denied enforcement on other grounds in *NLRB v. Pennwoven, Inc.,* 194 F.2d 521 and *Knickerbocker Manufacturing Company,* 109 NLRB 1195.

The reasons satisfactory to this employer for discharging petitioner in August, 1964, from his truck driving position need not necessarily have had validity in May, 1966, when he applied for new employment in any capacity. The factors of changed management, changed labor market or changed methods of operation make the concept of prospects of new employment a separate one from that of why a former employee was discharged. It is, therefore, improper to cling to a specific arbitration award, itself nothing more than an *election of remedies imposed on petitioner under his constructive protest,* and allow this award to have

future and continuing vitality beyond its scope. As stated in the partial concurrence and partial dissent of Mr. Justice Douglas in *Longshoremen v. Marine Trade Association*, 389 U.S. 64, at page 79:

> ". . . the new dispute may have been factually different from the one which precipitated the award."

The present case is one in which federal labor policy should be clarified and settled in the important matter of whether an individual working man is entitled to the remedial processes of the National Labor Relations Board if he seeks such in due and timely manner. The second important unsettled area is whether an arbitration award survives to govern unrelated future events. Respondent has so far essentially relied on *Spielberg Manufacturing Company*, 112 NLRB 1080, and its progeny. This reliance seems to have arisen because of a failure to accept the conceptual distinction between Cases 7-CA-503, and 7-CA-5562.

The only failing of Respondent that is actionable is the refusal to normally and regularly investigate the merits of Case No. 7-CA-5562. Should such investigation occur petitioner grants and concedes the practically unreviewable nature of the discretionary determination that will flow therefrom.

## (i-j) DOCUMENTS APPENDED

Copies of the relevant administrative opinions and of the orders sought to be reviewed are appended hereto. Administrative opinions in the form of letters dated February 10, 1965, March 5, 1965, May 5, 1965, June 23, 1966 and September 29, 1966 are identified as Appendices E through I, respectively.

Respectfully submitted,

DAVID G. HEILBRUN,
*Attorney for Petitioner,*
500 Northland Towers West,
Southfield, Michigan 48075.

Dated: August 9, 1968.

# APPENDIX A

## ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

UNITED STATES DISTRICT COURT
Eastern District of Michigan,
Southern Division

| | |
|---|---|
| ARMAND A. MAYER, *Plaintiff*, v. ARNOLD ORDMAN, as General Counsel of the National Labor Relations Board, *Defendant.* | Civil No. 29455 |

At a session of said court, held in the Courtroom in the Federal Building in the City of Detroit, Michigan, on the 29th day of May, 1967.

Present: The Honorable Fred W. Kaess, United States District Judge.

Plaintiff brings this action under the Fifth Amendment to the United States Constitution and Sections 1337 (Administrative Procedures Act) and 2201 (Declaratory Judgments Act) of Title 28, U.S.C.

The complaint alleges that defendant, as the person possessing final authority on behalf of the National Labor Relations Board, has failed and refused to investigate and inquire into the reasons why plaintiff's former employer, Earl C. Smith, Inc., had fired plaintiff.

It appears from the record that on May 13, 1966 plaintiff filed an unfair labor practice charge with the Regional Office of the National Labor Relations Board. The charge alleged that Earl C. Smith, Inc. had violated Section 8 (a)(1) and (3) of National Labor Relations Act by refusing to re-hire plaintiff Mayer and by threatening its employees. The Regional Director declined to issue a complaint on the grounds that there was no evidence to support the allegation of threats and that the refusal to re-hire was based on the same reasons as for plaintiff's discharge in August, 1964, which had been the subject of a prior National Labor Relations Board investigation. In the prior investigation the Regional Director had declined to issue a complaint for the reason that the propriety of the discharge had been heard and approved by an arbitration committee under the provisions of the collective bargaining contract between the company and Truck Drivers Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the collective bargaining representative of plaintiff, and other employees of Earl C. Smith, Inc.[1]

After the Regional Director's refusal to issue a complaint in each case, plaintiff appealed to the office of the General Counsel in Washington. The General Counsel, after *de novo* review, sustained the Regional Director's decisions. Plaintiff now brings this action seeking a declaratory judgment, setting forth his rights under the National Labor Relations Act, and a mandatory injunction to compel the General Counsel to investigate further into the merits of the unfair labor practice charges filed by him.

[1] Plaintiff claimed he was fired for Union activity. The Company said it had discharged him because of several accidents.

It is plaintiff's contention that the arbitration hearing on which General Counsel and Regional Director based their decisions not to issue a complaint was unfair, arbitrary, and lacked due process, because plaintiff did not have sufficient time to prepare his claim of unlawful discharge, and that therefore the National Labor Relations Board officials should not have held it binding on plaintiff. Plaintiff further argues the National Labor Relations Board policy of allowing participation in a private arbitration proceeding to deprive a person of statutory rights is based on erroneous and outdated law.

Defendant moves to dismiss on the grounds that this court has no jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted. In the alternative, defendant moves for summary judgment. The motion for summary judgment is supported by an affidavit by the Regional Director of the National Labor Relations Board, setting forth the various investigations and findings and stating that the evidence did not warrant the issuance of a complaint for unfair labor practices. Plaintiff has filed a cross-motion for summary judgment.

Section 3(d) of National Labor Relations Act [29 USC §153(d)] provides that:

> "the General Counsel . . . shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 100 of this Title, and in respect of the prosecution of such complaints before the board . . ."

By regulation the General Counsel has delegated authority to Regional Directors to issue such complaints (Regs. 29 C.F.R. §1002.15). A refusal of the Regional Director to issue a complaint may be appealed to the General Counsel (Regs. 29 C.F.D. §102.19). The General Counsel has a

wide discretion in determining whether a complaint should issue, and the Act provides no appeal from his decision, e.g., *NLRB v. Indiana & Mich. Elec. Co.*, 318 U.S. 9, 18-19 (1943); *Dunn v. Retail Clerks Int. Ass'n.*, 307 F.2d (6th Cir. 1962).

The cases are clear that Congress has provided an administrative tribunal, the National Labor Relations Board, to administer the Labor Acts and that, other than final orders from the NLRB, which are appealable to the United States Courts of Appeal, the power of the Board in disputes between labor and management is exclusive. E.g., *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1st Cir. 1938); *Dunn v. Retail Clerks Int. Ass'n., supra; Thompson Products, Inc. v. NLRB*, 133 F.2d 637, 640 (6th Cir. 1943); *Jacobsen v. NLRB*, 120 F.2d 96 (3rd Cir. 1941).

Thus, it is apparent that this court has no jurisdiction of this action. In the *Dunn* case, the 6th Circuit expressly affirmed the refusal of the District Court to issue an injunction requiring the Regional Director to investigate and act on an employer's complaint of unfair labor practice by a Union, stating:

> "Foreclosed as we are from entrance by judicial writ into such a situation, we must leave an injured party to the assistance of those empowered to apply administrative remedies or executive correction."[2]

Plaintiff argues that *Dunn v. Retail Clerks Int. Ass'n, supra*, is not applicable because here plaintiff is not asking the court to order the General Counsel to issue a complaint, but is only requesting that he be ordered to investigate. Nevertheless, it is clear that despite his protestations otherwise, plaintiff is in effect asking this court to tell the

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[2] As was stated in *Dunn*, the position of the General Counsel is much the same as that of the United States Attorney in determining whether a criminal charge should be issued.

General Counsel to perform an act which he in his discretion has determined not to do, or which he has done to his own satisfaction. This is what *Dunn* specifically states this Court has no jurisdiction to do.

Plaintiff's reliance on the grant of general jurisdiction, the Constitution and the Administrative Procedure Act, and the Declaratory Judgment Act, are not sufficient. A review by the Federal District Courts is not always necessary to preserve or protect rights created by Congress. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 301 (1943). Congress is entitled to determine the remedy it will provide, the extent to which it should be afforded and the means by which it should be made effective. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264 (1940). In enacting the National Labor Relations Act, Congress created specific rights and specific remedies. It did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It confined the primary interpretation and application of the Act to a specific and specially constituted tribunal, the National Labor Relations Board. *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953). "Consequently, as a general rule, neither state nor federal courts have jurisdiction over suits directly involving an activity [which] is arguably subject to §7 or §8 of the Act. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, at 245." *Vaca v. Sipes*, 386 U.S. 171, 179 (1967).

It is expressly provided in Section 10 of the Administrative Procedure Act that there is no judicial review where "agency action is committed by law to agency discretion". It is clear from the cases cited above, and many others, that refusal by the NLRB to issue a complaint is an exercise of discretion unreviewable by the courts. Also, in Senate Report No. 752 (79th Congress, 1st Session 43)

the United States Attorney General specifically stated that refusal to issue a complaint under the National Labor Relations Act is not reviewable as provided in Section 10.

With regard to the Declaratory Judgments Act, it is sufficient to say that it does not confer jurisdiction on the District Courts, but merely provides an additional remedy where there is jurisdiction. *Skelly Oil Co. v. Phillips Pet. Co.*, 339 U.S. 667, 671-672 (1950).

With regard to plaintiff's assertion of violation of his Constitutional rights by virtue of deprivation of property without due process, it is clear that the rights plaintiff seeks to enforce are statutory rights created expressly by Congress, and not Constitutional rights. Plaintiff has no Constitutional right to a Board action in his behalf. This is a statutory remedy provided for the public benefit, to be applied in the discretion of the General Counsel. I see no Constitutional question here. *McLeod v. Industrial Workers*, 288 F.2d 198, 201 (2d Cir. 1961). See also, *Potter v. Castle Const. Co.*, 355 F.2d 212, 216, 217 (5th Cir. 1966).

The Court did not consider the correctness of the General Counsel's reliance on the so-called "Spielberg doctrine"[3] or the validity of the arbitration proceeding. The issue here considered is that of jurisdiction. As this Court has no authority to order the General Counsel to exercise his discretion, there is no need to pass upon these other grounds asserted for dismissal, or on the motions for summary judgment.

IT IS ORDERED that defendant's motion to dismiss for lack of jurisdiction of the subject matter is granted.

Fred W. Kaess,
United States District Judge.

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[3] Spielberg Mfg. Co., 112 NLRB 1080, 1082 (1955).

# APPENDIX B

## OPINION OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18,058

(Filed March 29, 1968)

Decided March 29, 1968

Before Phillips, Celebrezze and Peck, Circuit Judges.

Per Curiam. This action is based upon the refusal of the General Counsel of the National Labor Relations Board to investigate certain charges of unfair labor practices. Averring that he was wrongfully discharged by his employer, plaintiff sought mandatory and declaratory relief to require the General Counsel to investigate.

District Judge Fred W. Kaess dismissed the action for lack of jurisdiction over the subject matter for the reasons stated in his order which is made an appendix to this opinion.

This panel was appointed by the Chief Judge under Rule 3(5) of the rules of this Court to review the next pending cases on the docket. It is well settled that the National Labor Relations Act precludes District Court review of the manner in which the General Counsel of the Board investigates unfair labor practice charges and determines whether to issue a complaint thereon. *Vaca v. Sipes*, 386 U.S. 171, 182; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *N.L.R.B. v. Tennessee Products & Chemical Corp.*, 329 F.2d 873 (6th Cir.); *Dunn v. Retail Clerks Local 1529*, 307 F.2d 285 (6th Cir.); *United Electrical Contractors Assn. v. Ordman*, 366 F.2d 776 (2d Cir.), cert. denied, 385 U.S. 1026.

The District Court clearly was correct in holding that it had no jurisdiction in this action. We therefore find that the appeal is frivolous and entirely without merit. The appeal is dismissed under Rule 18(6) of the rules of this Court, as amended December 12, 1967.[1]

## APPENDIX

Plaintiff brings this action under the Fifth Amendment to the United States Constitution and Sections 1337 (Administrative Procedures Act) and 2201 (Declaratory Judgments Act) of Title 28, U.S.C.

The complaint alleges that defendant, as the person possessing final authority on behalf of the National Labor Relations Board, has failed and refused to investigate and inquire into the reasons why plaintiff's former employer, Earl C. Smith, Inc., had fired plaintiff.

It appears from the record that on May 13, 1966 plaintiff filed an unfair labor practice charge with the Regional Office of the National Labor Relations Board. The charge alleged that Earl C. Smith, Inc. had violated Section 8(a) (1) and (3) of National Labor Relations Act by refusing to re-hire plaintiff Mayer and by threatening its employees. The Regional Director declined to issue a complaint on the grounds that there was no evidence to support the allegation of threats and that the refusal to re-hire was based on the same reasons as for plaintiff's discharge in August, 1964, which had been the subject of a prior National Labor Re-

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[1] "(6) Frivolous and Unmeritorious Appeals.

"If upon the hearing of any interlocutory motion or as a result of a review under Rule 3(5), it shall appear to the Court that the appeal is frivolous and entirely without merit, the appeal will be dismissed."

lations Board investigation. In the prior investigation the Regional Director had declined to issue a complaint for the reason that the propriety of the discharge had been heard and approved by an arbitration committee under the provisions of the collective bargaining contract between the company and Truck Drivers Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the collective bargaining representative of plaintiff, and other employees of Earl C. Smith, Inc.[1]

After the Regional Director's refusal to issue a complaint in each case, plaintiff appealed to the office of the General Counsel in Washington. The General Counsel, after *de novo* review, sustained the Regional Director's decisions. Plaintiff now brings this action seeking a declaratory judgment, setting forth his rights under the National Labor Relations Act, and a mandatory injunction to compel the General Counsel to investigate further into the merits of the unfair labor practice charges filed by him.

It is plaintiff's contention that the arbitration hearing on which General Counsel and Regional Director based their decisions not to issue a complaint was unfair, arbitrary, and lacked due process, because plaintiff did not have sufficient time to prepare his claim of unlawful discharge, and that therefore the National Labor Relations Board officials should not have held it binding on plaintiff. Plaintiff further argues the National Labor Relations Board policy of allowing participation in a private arbitration proceeding to deprive a person of statutory rights is based on erroneous and outdated law.

Defendant moves to dismiss on the grounds that this court has no jurisdiction over the subject matter and that the

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complaint fails to state a claim upon which relief can be granted. In the alternative, defendant moves for summary judgment. The motion for summary judgment is supported by an affidavit by the Regional Director of the National Labor Relations Board, setting forth the various investigations and findings and stating that the evidence did not warrant the issuance of a complaint for unfair labor practices. Plaintiff has filed a cross-motion for summary judgment.

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The cases are clear that Congress has provided an administrative tribunal, the National Labor Relations Board, to administer the Labor Acts and that, other than final orders from the NLRB, which are appealable to the United States Courts of Appeal, the power of the Board in disputes between labor and management is exclusive. E.g.,

*Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1st Cir. 1938); *Dunn v. Retail Clerks Int. Ass'n., supra; Thompson Products, Inc. v. NLRB*, 133 F.2d 637, 640 (6th Cir. 1943); *Jacobsen v. NLRB*, 120 F.2d 96 (3rd Cir. 1941).

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> "Foreclosed as we are from entrance by judicial writ into such a situation, we must leave an injured party to the assistance of those empowered to apply administrative remedies or executive correction."[2]

Plaintiff argues that *Dunn v. Retail Clerks Int. Ass'n, supra,* is not applicable because here plaintiff is not asking the court to order the General Counsel to issue a complaint, but is only requesting that he be ordered to investigate. Nevertheless, it is clear that despite his protestations otherwise, plaintiff is in effect asking this court to tell the General Counsel to perform an act which he in his discretion has determined not to do, or which he has done to his own satisfaction. This is what *Dunn* specifically states this Court has no jurisdiction to do.

Plaintiff's reliance on the grant of general jurisdiction, the constitution and the Administrative Procedure Act, and the Declaratory Judgments Act, are not sufficient. A review by the Federal District Courts is not always necessary to preserve or protect rights created by Congress. *Switchmen's Union v. National Mediation Bd.*, 320 U.S.

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[2] As was stated in *Dunn*, the position of the General Counsel is much the same as that of the United States Attorney in determining whether a criminal charge should be issued.

297, 301 (1943). Congress is entitled to determine the remedy it will provide, the extent to which it should be accorded and the means by which it should be made effective. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264 (1940). In enacting the National Labor Relations Act, Congress created specific rights and specific remedies. It did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It confined the primary interpretation and application of the Act to a specific and specially constituted tribunal, the National Labor Relations Board. *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953). "Consequently, as a general rule, neither state nor federal courts have jurisdiction over suits directly involving an activity [which] is arguably subject to §7 or §8 of the Act. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, at 245." *Vaca v. Sipes*, 386 U.S. 171, 179 (1967).

It is expressly provided in Section 10 of the Administrative Procedure Act that there is no judicial review where "agency action is committed by law to agency discretion." It is clear from the cases cited above, and many others, that refusal by the NLRB to issue a complaint is an exercise of discretion unreviewable by the courts. Also, in Senate Report No. 752 (79th Congress, 1st Session 43) the United States Attorney General specifically stated that refusal to issue a complaint under the National Labor Relations Act is not reviewable as provided in Section 10.

With regard to the Declaratory Judgments Act, it is sufficient to say that it does not confer jurisdiction on the District Courts, but merely provides an additional remedy where there is jurisdiction. *Skelly Oil Co. v. Phillips Pet. Co.*, 339 U.S. 667, 671-672 (1950).

With regard to plaintiff's assertion of violation of his Constitutional rights by virtue of deprivation of property without due process, it is clear that the rights plaintiff seeks to enforce are statutory rights created expressly by Congress, and not Constitutional rights. Plaintiff has no Constitutional right to a Board action in his behalf. This is a statutory remedy provided for the public benefit, to be applied in the discretion of the General Counsel. I see no Constitutional question here. *McLeod v. Industrial Workers*, 288 F.2d 198, 201 (2d Cir. 1961). See also, *Potter v. Castle Const. Co.*, 355 F.2d 212, 216, 217 (5th Cir. 1966).

The Court did not consider the correctness of the General Counsel's reliance on the so-called "Spielberg doctrine"[3] or the validity of the arbitration proceeding. The issue here considered is that of jurisdiction. As this Court has no authority to order the General Counsel to exercise his discretion, there is no need to pass upon these other grounds asserted for dismissal, or on the motions for summary judgment.

It is ordered that defendant's motion to dismiss for lack of jurisdiction of the subject matter is granted.

Fred W. Kaess,
United States District Judge.

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[3] Spielberg Mfg. Co., 112 NLRB 1080, 1082 (1955).

# APPENDIX C

## ORDER OF U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 18,058**

**(Filed March 29, 1968)**

**Before: Phillips, Celebrezze and Peck, Circuit Judges.**

**It is ordered that this appeal be and it is dismissed, pursuant to opinion this day filed.**

**Entered by order of the Court.**

**Carl W. Reuss,**
**Clerk.**

# APPENDIX D

## ORDER OF U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT OVERRULING MOTION FOR RECONSIDERATION

No. 18,058

(Filed April 30, 1968)

Before: Phillips, Celebrezze and Peck, Circuit Judges.

Plaintiff-appellant has filed a motion of reconsideration of the action of this Court in dismissing the appeal under Rule 18(6) as frivolous and entirely without merit.

It is ORDERED that the motion for reconsideration be and hereby is overruled.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

# APPENDIX E

NATIONAL LABOR RELATIONS BOARD
Seventh Region
500 Book Building, Detroit, Michigan 48226

February 10, 1965

Armond Mayer
19018 Annchester
Detroit, Michigan

Re: Earl C. Smith, Inc.
Case No. 7-CA-5031

Dear Sir:

Please be informed that pursuant to the policy announced by the Board in *Dubo Manufacturing Corporation*, 142 NLRB 431, this office is deferring action on the charges filed in the above matter pending completion of the proceedings pending before the Michigan Joint Cartage and Over-the-Road Arbitration Committee.

Upon notification of final action by the Arbitration Committee, this office will review the arbitration award by applying the standards enunciated in *Spielberg Manufacturing Company*, 112 NLRB 1081, wherein the Board evaluated the arbitration proceeding in relation to whether it appeared to have been fair, sufficient and regular, all parties had agreed to be bound thereby and that the decision of the arbitration panel was not clearly repugnant to the purposes and policies of the Act. Upon such review by the office, a determination will then be made in reference to the further processing, if any, of the charge.

I am, therefore, requesting you to notify this office immediately upon the issuance of any decision by the Arbitration Committee concerning your grievance.

Very truly yours,

/s/ Jerome H. Brooks,
Acting Regional Director

cc: Robert Allen Parr, Esq.
Suite 1700
One Woodward Avenue
Detroit, Michigan 48226

Earl C. Smith, Inc.
6464 Strong Street
Detroit, Michigan

International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers
of America, Ind., Local 299
2741 Trumbull
Detroit, Michigan 48216
Attn: Sam Calhoun

# APPENDIX F

NATIONAL LABOR RELATIONS BOARD
Seventh Region
500 Book Building, Detroit, Michigan 48226

March 5, 1965

Mr. Armond Mayer
19018 Anchester
Detroit, Michigan

Re: Earl C. Smith, Inc.
Case No. 7-CA-5031

Dear Mr. Mayer:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that because there is insufficient evidence of violation, further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington, D. C. 20570, and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D. C., by the close of business on Thursday, March

18, 1965. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for an extension of time should be submitted to me.

Very truly yours,

/s/ Jerome H. Brooks,
Acting Regional Director

cc: General Counsel
National Labor Relations Board
Washington, D. C. 20570
Statistical Analysis Branch

Earl C. Smith, Inc.
6464 Strong Street
Detroit, Michigan

Robert Allen Parr, Esq.
Suite 1700
One Woodward Avenue
Detroit, Michigan 48226

# APPENDIX G

NATIONAL LABOR RELATIONS BOARD

Office of the General Counsel

Washington, D. C. 20570

May 5, 1965

Re: Earl C. Smith, Inc.
Case No. 7-CA-5031

Mr. Gordon A. Gregory
Livingston, Gregory, Van Lopik &
Cranefield
2142 First National Building
Detroit, Michigan 48226

Dear Mr. Gregory:

Your appeal from the Regional Director's refusal to issue complaint in the above case, together with your statements of March 26 and April 29 in support thereof, has been duly considered.

The appeal is denied. Under all the circumstances, insufficient basis existed for a finding that the arbitration proceedings upholding Mayer's discharge, and in which Mayer participated, were not fair and regular. See *Denver-Chicago Trucking Company, Inc.*, 132 NLRB 1416; *Modern Motor Express, Inc.*, 149 NLRB No. 147. Accordingly, and since the decision of the panel upholding the Company's

action was not repugnant to the policies of the Act, further proceedings herein were deemed unwarranted.

Very truly yours,

Arnold Ordman
General Counsel
By: Irving M. Herman
Director, Office of Appeals

cc: Director, 7th Region

Mr. Armond Mayer, 19018 Anchester, Detroit, Michigan

Earl C. Smith, Inc., 6464 Strong Street, Detroit, Michigan

Robert Allen Parr, Esq., Suite 1700, One Woodward Avenue, Detroit, Michigan 48226

CERTIFIED MAIL

# APPENDIX H

NATIONAL LABOR RELATIONS BOARD
Seventh Region
500 Book Building, Detroit, Michigan 48226

June 23, 1966

Mr. Armand A. Mayer
19018 Annchester
Detroit, Michigan 48219

Re: Earl C. Smith, Inc.
Case No. 7-CA-5562

Truck Drivers, Warehousemen and Helpers, Local Union #299, aff. with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
Case No. 7-CB-1428

Dear Sir:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that because there is insufficient evidence of violation, further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter. A summary report setting forth the reasons for my refusal to issue Complaint in this matter follows:

In the charge against the Employer, the Charging Party contends that the Employer refused to accept his application for employment because he had filed numerous griev-

ances prior to his discharge by the Employer in August of 1964. The issue of whether the 1964 discharge of the Charging Party was based upon his filing of grievances was considered by the Michigan Joint State Cartage and Over-The-Road Arbitration Committee on four separate occasions and no merit was found to this contention. The Charging Party's previous charge in Case No. 7-CA-5031 concerning his discharge was dismissed by this office on March 5, 1965, on the ground that there was no evidence that the aforesaid arbitration proceedings were not fair and regular. See *Modern Motor Express, Inc.*, 149 NLRB 1507. On May 5, 1965, the General Counsel upheld the dismissal of said charge. In regard to the application for employment involved herein, there is no evidence that the Employer refused to hire the Charging Party for discriminatory reasons. The refusal to hire was based upon the previous discharge action and the non-pretextual nature thereof had previously been found in the arbitration proceeding. Further, no evidence was presented to indicate that the Employer had in any way attempted to influence the testimony of its employees by that or any other coercive activity.

The charge against the Union alleges that it discriminatorily failed to represent the Charging Party before the Michigan Joint State Cartage and Over-The-Road Arbitration Committee. In view of the fact that the Charging Party was given three re-hearings of his 1964 discharge grievance, the most recent of which took place at the instigation of the president of the Union in January 1966, I find no merit to this allegation. The statements of a union agent expressing exasperation in regard to the numerous grievances filed by the Charging Party or in regard to his filing of charges against the Union are not such as to warrant issuance of Complaint herein, nor is there any

evidence of a discriminatory failure to represent the Charging Party for arbitrary, irrelevant or invidious reasons.

Accordingly, issuance of Complaint in the above cases was deemed to be unwarranted. Your request for evidence and other information obtained in the course of the investigation of the above cases is denied. Section 102.117(b) and 102.118 of the Board's Rules and Regulations, Series 8, as amended.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington, D. C. 20570, and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D. C., by close of business on July 6, 1966. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for an extension of time should be submitted to me.

Yours very truly,

Jerome H. Brooks
Regional Director

JAB:amm

cc: Robert A. Parr, Esq.
Suite 1700
One Woodward Avenue
Detroit, Michigan 48226

Earl C. Smith, Inc.
1720 Dove Street
Port Huron, Michigan 48060

David G. Heilbrun, Esq.
500 Northland Towers West
Southfield, Michigan 48075

Truck Drivers, Warehousemen and Helpers,
Local Union #299, aff. with International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America
2741 Trumbull
Detroit, Michigan 48226

David L. Uelmen, Esq.
Goldberg, Previant & Ueumen
511 Warner Theatre Building
Milwaukee, Wisconsin 53203

Lawrence A. Burns, Esq.
2850 Guardian Building
Detroit, Michigan 48226

General Counsel
National Labor Relations Board
Washington, D. C. 20570

# APPENDIX I

NATIONAL LABOR RELATIONS BOARD

Office of the General Counsel

September 29, 1966

Re: Earl C. Smith, Inc.
Case No. 7-CA-5562
Truck Drivers, Warehousemen and Helpers, Local Union #299, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
Case No. 7-CB-1428

David G. Heilbrun, Esq.
O'Leary, Murphy, Fregolle,
Heilbrun and Berg
500 Northland Towers West
Southfield, Michigan 48075

Dear Mr. Heilbrun:

Your appeal from the Regional Director's refusal to issue complaint in the captioned cases, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

The appeal is denied. Since the question of the fairness and regularity of the arbitration upholding Mayer's 1964 discharge was fully considered in Case No. 7-CA-5031 (appeal denied May 6, 1965), further proceedings with re-

spect to that matter would not effectuate the policies of the Act. The contention was also made in the instant case that the arbitration did not merit the deference of the Board because of failure to notify the employee that the arbitration was binding upon him under the Board's *Spielberg* doctrine. However, in the orderly administration of the Act, such contention, made for the first time in the instant case almost two years after the arbitration proceeding involved, comes too late to provide a basis for what, in effect, would be a reopening of the prior charge.

Accordingly, and apart from other considerations, since the failure of the Company to employ Mayer in 1966 was based upon his previous discharge which had been upheld by the arbitration, further proceedings thereon were deemed unwarranted.

Nor, in view of the arbitration award, could any basis be said to exist for a finding that the Union's failure to take action in Mayer's behalf regarding employment with the Company in 1966 was based upon any consideration other than a good-faith belief that the grievance lacked merit.

Moreover, insufficient basis existed for a finding that the investigation of the present charges were incomplete. While certain individuals named by Mayer were not interviewed, there was no indication that they could relate information relevant to any issue not considered in the prior case.

Very truly yours,

Arnold Ordman
General Counsel
By: /s/ Irving M. Herman
Director, Office of Appeals

cc: Director, Region 7

Mr. Armand A. Mayer, 19018 Annchester, Detroit, Michigan

Robert A. Parr, Esq., Suite 1700, One Woodward Avenue, Detroit, Michigan 48226

Earl C. Smith, Inc., 1720 Dove Street, Port Huron, Michigan

Truck Drivers, Warehousemen and Helpers, Local Union #299, affiliated with International Brotherhood of Teamsters, Chauffenrs, Warehousemen and Helpers of America, 2741 Trumbull, Detroit, Michigan 48226

David L. Uelmen, Esq., Goldberg, Previant & Uelmen, 511 Warner Theatre Building, Milwaukee, Wisconsin 53203

Lawrence A. Burns, Esq., 2850 Guardian Building, Detroit, Michigan 48226

CERTIFIED MAIL